calculated, and second, that as the purpose of the shipment was known to the carrier the loss was one within the contemplation of the parties (*Dunn* v. *Bucknall Bros.* [1902] 2 K. B. 614.)

While the fact of knowledge makes the case quite different from *The Parana*, it is to be hoped that the older case has been permanently set aside. The principle on which it proceeds, as suggested in Sedgwick on Damages (8th ed. § 855), is altogether wrong. The fundamental rule is that one who breaks his contract is liable for such damage as may fairly and reasonably be considered, either as arising in the usual course of things from the breach, or, if not so arising, then as within the contemplation of the parties when they made the contract. *Hadley* v. *Baxendale* (1854), 9 Ex. 341; *Griffin* v. *Colver* (1858) 16 N. Y. 489. Now when a carrier delays in delivery, he may commit two wrongs; he keeps the goods from their owner, and he may, perhaps injure them. For example, if perishable goods are delayed, their quality suffers. When goods are injured by a carrier, there is no question that the measure of damages is the difference between their value as they were delivered and that as they should have been delivered. *Henderson* v. *Maid of Orleans* (1857) 12 La. Ann. 352; *Heil* v. *St. Louis, etc., R. Co.* (1885) 16 Mo. App. 363; *The Surrey* (1887) 30 Fed. 223. But when goods of a kind usually sold in market are kept from the market, an actual injury is done them. A diminution in their market value as said by GRAY, J., in *Cutting* v. *Grand Trunk R. Co.* (Mass. 1866) 13 All. 381, is "a real and actual loss of a portion of the real and intrinsic value, as much as a change for the worse in the quality of the goods." The goods are of less value because of their not reaching the market in time; the injury is not the consequence of the carrier's wrong, but the very wrong itself. And so it has been decided in numberless cases of carriage by land, that the measure of damages for delay is the difference between the market value at the time the goods arrive and that when they should have arrived, together with interest, less freight due. If there is no fall in the market, interest during the period of delay on the value at the time the goods should have arrived, is proper compensation for the injury of detention. *Smith* v. *Whitman* (1850) 13 Mo. 352. And the American courts have made no distinction in carriage by sea. *The Success* (1870) 1 Blatch. 551; *The Prussia* (1900) 100 Fed. 484. In *The Parana* the Court treated the loss of market as a loss of profits, for which, had their premise been sound, they would have been right in denying recovery as a consequential loss not within the contemplation of the parties. But the same argument was advanced and overthrown in *Cutting* v. *Grand Trunk R. Co., supra,* and in *Wilson* v. *L. & Y. R. Co.* (1861) 9 C. B. (N. S.) 632. "I believe we are all of opinion that the plaintiff is not entitled to anything for loss of profits," said BYLES, J., in the latter case; "but it must not be assumed that loss of profits and diminution of value mean the same thing."

HOW FAR MORTGAGOR WHO HAS TRANSFERRED HIS EQUITY OF REDEMPTION IS A MERE SURETY.—When a mortgagor conveys the mortgaged property, his grantee is evidently brought into connection in some way with the mortgage transaction. How far this threefold

relation of mortgagee, grantee, and mortgagor is analogous to that of creditor, principal and surety, and governed by the principles of suretyship is a question that has frequently arisen in one form or another. Whether the mortgagor becomes a surety so far as his rights against the mortgagee are concerned is perhaps the most disputed point of all and has been considered with especial care by the courts of New York, which have taken the lead in asserting the existence of such a relation. The recent case of *Gottschalk* v. *Jungmann* (1903) 79 N. Y. Supp. 551, has some interest therefore as showing the completeness with which this doctrine is being developed in New York.

The first cases on this subject arose where the purchaser of the property also contracted to assume the mortgage debt. As between the purchaser and the mortgagor, the court had no trouble in finding the relation of principal and surety. The mortgagor was entitled in equity as against the purchaser to have the debt satisfied in the first place out of the property conveyed; or, if he paid the debt himself he was subrogated to the mortgage security. *Halsey* v. *Reed* (1842) 9 Paige 446. But as against the mortgagee he was not yet regarded as a surety and could not file a bill to compel him to proceed in the first instance against the purchaser. *Marsh* v. *Pike* (1843) 1 Sandf. Ch. 210, affirmed in (1844) 10 Paige 595. This continued to be the generally accepted view, apparently, as late as *Meyer* v. *Lathrop* (1877) 10 Hun 66, where it was held that giving a binding extension of time to the purchaser did not discharge the mortgagor. *Calvo* v. *Davies* (1878) 73 N. Y. 211, seems to have been the first case in the highest court in which the contrary doctrine was definitely maintained and such an extension held to discharge a mortgagor as it would any surety. The same principle was applied in *Paine* v. *Jones* (1879) 76 N. Y. 274, when there was an alteration of the terms of the mortgage, and in *Russell* v. *Weinberg* (1878) 4 Abb. N. C. 139, where there was a failure to comply with a request to foreclose and a depreciation of the property and the mortgagor as surety was held to be discharged *pro tanto* under the familiar New York rule as laid down in *Pain* v. *Packard* (1815) 13 Johns. 174. A further and important advance was made in *Murray* v. *Marshall* (1884) 94 N. Y. 611. There, unlike the foregoing cases, the purchaser did not assume the debt, but nevertheless the mortgagor was regarded as a surety to the extent of the value of the land and was entirely discharged by an extension of the mortgage, the land being sufficient to pay the debt. So in *Osborne* v. *Hayward* (1899) 40 App. Div. 78, the doctrine of *Pain* v. *Packard* was applied to a case where the conveyance of the property was without assumption of the debt. The present case of *Gottschalk* v. *Jungmann* differed from *Osborne* v. *Heyward* in only one respect. The injury to the mortgagor, instead of consisting in the depreciation of the property, lay in the fact that the mortgagee by failing to foreclose on request, allowed taxes, water rates, and interest to accumulate, as well as rent to be received by the grantee of the premises. It was held that the mortgagee was reponsible for the amount by which the available proceeds of the sale were diminished by reason of the incumbrances and the mortgagor was released to that extent. Concerning the rents the court was divided on the question

as to whether under the circumstances the mortgagee was bound in due diligence to impound the rents by having a receiver appointed, a majority holding that he was not.

The New York courts have thus step by step assimilated the position of a mortgagor who has parted with the land to that of a surety until now it may be said that he is equally protected against impairment of his rights by act of his creditor. If the purchaser of the land has assumed the debt, the protection extends to the amount of the debt, otherwise only to the value of the land. *Matter of Piza* (1896) 5 App. Div. 181. This rule is derived from the principle that the mortgagor, having the right to pay the debt and recover the amount from the person who has contracted to pay it or from the land which in equity is primarily liable for it, *Johnson* v. *Zink* (1873) 51 N. Y. 333, is discharged by any act of the mortgagee which interferes with the exercise of such right. The same view has been adopted elsewhere especially in case of assumption of the debt by the purchaser. *George* v. *Andrews* (1882) 60 Md. 26; *Pratt* v. *Conway* (1899) 148 Mo. 291; *Herd* v. *Tuohy* (1901) 133 Cal. 55; but also where there was no assumption, *Travers* v. *Dorr* (1895) 60 Minn. 173; *Bunnell* v. *Carter* (1896) 14 Utah 100; but *Chilton* v. *Brooks* (1890) 72 Md. 554 is *contra*. Many courts, however, refuse to recognize that as against the mortgagee the mortgagor has any of a surety's rights, their theory being that the sale of the property is a transaction to which the mortgagee is not a party and which therefore cannot affect his position or compel him to treat his former principal debtor as having become a surety, unless there is a novation. *Denison University* v. *Manning* (1901) 65 Ohio St. 138, criticized in 2 COLUMBIA LAW REVIEW 123. A similar result was reached in *Fish* v. *Glover* (1894) 154 Ill. 86, where a statute providing for the discharge of a surety on the creditor's failure to sue on request was held inapplicable to such a case. These decisions however lose sight of the fact that the rights of indemnity and subrogation and the doctrine that a surety is discharged if they are violated by the creditor, are of equitable origin and should therefore be determined according to the actual relations of the parties and not according to the technical form of the contract. If the mortgagor has a right to be secured by the land he has conveyed and the mortgagee knows this, it is hard to see why he should not be bound to respect it. Perhaps a feeling that there is a certain hardship in the strictness with which a creditor is bound to respect a surety's interests has had weight in inducing some courts to reject the New York doctrine.

If the mortgagor's position is practically that of a surety, there is no reason why the rule laid down in *Pain* v. *Packard* should not apply to such a case as *Gottschalk* v. *Jungmann*, just as was done in *Colgrove* v. *Tallmann* (1876) 67 N. Y. 95, where the suretyship was merely implied from the relation of partnership. And on principle the extension of the rule to cover cases of impairment of the mortgage security by allowing the creation of subsequent incumbrances seems correct, as the injury to the surety from the creditor's failure to sue as required is the basis of his release from liability, *King* v. *Baldwin* (1819) 17 Johns. 384, 390, and any injury resulting from such failure should therefore be sufficient.